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No. 87-1903

IN THE

Supreme Court of the United States

October Term, 1987

FITGER BREWING COMPANY,
a Minnesota corporation,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the jury finds that the public planning activities mandated by federal law and undertaken by the State of Minnesota in planning a major interstate highway construction project have affected the value of property owned by the Fitger Brewing Co., did the Minnesota Court of Appeals err in finding that the State's planning activities did not constitute a taking under this Court's standards for determining whether a taking has occurred within the Fifth and Fourteenth Amendments of the U.S. Constitution?

2. Should this Court resolve a conflict among the states and federal courts regarding when government planning activities give rise to a constitutional taking where, even under the more stringent analysis of the minority jurisdictions, this case does not give rise to a taking?

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Respondent, State of Minnesota, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Court of Appeals' opinion in this case. That opinion is reported at 416 N.W.2d 200 and is reproduced in Appendix A to the petition.

STATEMENT OF THE CASE

The State of Minnesota (State), in cooperation with the City of Duluth and the U.S. Department of Transportation, began planning for the development of federal Interstate Highway 35 (I-35) in Duluth, Minnesota, in the late 1950's.[1] (Tr. Ct. T. 980-81.) The planning of this controversial project has spanned 20 years. Throughout this litigation, the Petitioner, Fitger Brewing Co. (Fitger), has alleged that the effect of this planning process on its property constitutes a taking within the meaning of the Fifth and Fourteenth Amendments of the United States Constitution.

Beginning in 1958 and continuing through 1970, the State of Minnesota examined three separate design proposals for I-35 in Duluth, Minnesota. (Tr. Ct. T. 980-1001.) Each of these proposals was presented to the citizens of Duluth for consideration and was rejected. (*Id.*) In November 1970, a design that would have required a taking of the Fitger Brewery was presented to the Duluth City Council for preliminary approval. Upon receipt of the City's preliminary approval, the State intended to hold extensive public hearings on the proposal prior to making a final decision on the highway's location. (Tr. Ct. T. 732-33.)

Simultaneously, between 1968 and 1970, the federal government adopted legislation and regulations compelling federal and state agencies to undertake extensive public planning prior to construction of major highway projects such as I-35.[2]

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[1] Unless otherwise noted, all factual references contained herein are to the Trial Court Transcript which has previously been certified and filed with the Clerk of the Minnesota Court of Appeals pursuant to Minn. R. Civ. App. P. 110.02, subd. 2.

[2] Section 4(f) of the Department of Transportation Act of 1966 as amended and section 18(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C. § 139 formerly 49 U.S.C. § 1653(f)) required the

(Tr. Ct. T. 113-14 and 1081-94.) In response to increased planning requirements and to growing public concerns, the City of Duluth, in 1970, requested that an independent consultant be hired to evaluate the feasibility of the I-35 project. (Tr. Ct. T. 1001-02.) All State activity on I-35 was immediately suspended. In December 1971, the consultant firm of Eckbo, Dean, Austin, and Williams (Eckbo) was hired to undertake a comprehensive analysis of the I-35 project. (Tr. Ct. T. 1003-05.) The Eckbo study spanned two years and involved analysis of several designs within five separate corridors. (Tr. Ct. T. 1192-97.) Each corridor was sixty-eight city blocks in length and approximately one-half mile wide. (*Id.*) The Eckbo firm held over sixty public meetings on the I-35 project in Duluth, the majority of which were attended by Fitger President, John Ferris. (Tr. Ct. T. 161-62.)

The Fitger Company, prior to and during this planning process, operated its brewing facility in Duluth, Minnesota. In response to local rumors that the State was considering new plans for I-35, Fitger contacted the State in September, 1970 and requested that the State not take its property or that the State commit to completing a plan for I-35 on a date certain. (Tr. Ct. Exh. 15.) The State informed Fitger that the I-35 proposal then under consideration would require a taking of the Fitger property and that this plan was being advanced to the City of Duluth as a suggestion. (Tr. Ct. Exh. 16.) From

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preparation of a 4(f) statement analyzing the effect of highway construction projects on parklands and historic properties; the National Environmental Policy Act enacted in January, 1970 (42 U.S.C. § 4232) required the preparation of a detailed environmental impact statement prior to undertaking a major federally-funded highway construction project; and regulations of the Federal Highway Administration (FHWA) adopted in 1969 established a two-phased planning and public hearing process for federally-funded highway construction projects (FHWA, PPM 20-8, Tr. Ct. Exh. 51).

1970 on, Fitger made regular inquiries as to whether its property would be taken for the I-35 project. After the Eckbo firm was retained to do a feasibility study, Fitger was continually advised by Eckbo that some of the plans under consideration would require the Fitger property and some would not. (Tr. Ct. T. 1199-1201.)

Throughout the 1950's and 1960's, Fitger's sales were steadily declining. Fitger had insufficient capital to finance improvements, it was unable to acquire bank financing, and it was unable to pay its bills as they became due. (Tr. Ct. T. 97-98, 287, 307-08.)

As part of its manufacturing process, Fitger dumped 50,000 gallons of cooling waters and 37,000 gallons of processing waters containing industrial wastes into Lake Superior daily. (Tr. Ct. T. 1341-42.) As early as 1968, the Minnesota Pollution Control Agency had mandated that Fitger install pollution abatement equipment. But Fitger did not have sufficient working capital to do so. (Tr. Ct. Exh. 8.) The installation of abatement equipment, if it was to occur at all, had to be personally financed by Fitger President, John Ferris. (Tr. Ct. T. 307-08, 378.)

After receiving numerous extensions of time to meet State pollution standards, Fitger contacted the Minnesota Pollution Control Agency in July 1971 and volunteered to either abate pollution or terminate operations on September 30, 1972. (Tr. Ct. Exh. 24.) On September 5, 1972, Fitger contacted the Governor of Minnesota and requested that its property be condemned. (Tr. Ct. Exh. 28.) In response, the Minnesota Commissioner of Highways, on September 25, 1972, advised Fitger that all plans then under consideration would require taking some part of the Fitger property. (Tr. Ct. Exh. 30.) But the Commissioner also stated:

> . . . In addition, we must advise you that there is a possibility that I-35 may not be extended beyond Mesaba Avenue; the possibility of some other alignment of which we are unaware of at this time, other proposals from our consultants or other consultants, or the public, which may eliminate the necessity of taking the Fitger Brewing Company.

(Id.) Despite the State's continual advice that a taking of the Fitger property was not certain, Fitger closed its brewery on September 30, 1972. (Tr. Ct. T. 176-78.) On that date, the Eckbo firm was actively considering 25-30 designs, some of which would not have required a taking of the Fitger property. (Tr. Ct. T. 1195-97.)

On March 20, 1973, the Eckbo firm adopted a "preferred" alternative that would have required the taking of the Fitger property.[3] (Tr. Ct. T. 1197.) This alternative was incorporated into the State's draft environmental impact statement (EIS) which was released in October 1973. (Tr. Ct. T. 1194-98.) A corridor hearing addressing the preferred alternative was held in Duluth on October 19, 1973. (Tr. Ct. T. 1014.) The Eckbo preferred alternative met with strenuous public opposition. (Tr. Ct. T. 1201-02.) As a result, the State, the Federal Highway Administration and the City of Duluth undertook further studies of the I-35 project. (Tr. Ct. T. 1014-20, 1203.) It was not until April 1, 1976, that an alter-

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[3] The opinion of the Minnesota Court of Appeals incorrectly states that the Eckbo firm adopted its preferred alternative on March 20, 1972. This is an apparent clerical error. The uncontroverted testimony at trial was that the Eckbo preferred alternative was adopted on March 20, 1973. (Tr. Ct. T. 1197.) The 1973 date is also referenced in Respondent State of Minnesota's brief to the Minnesota Court of Appeals. The Minnesota Court of Appeals has been notified of this clerical error.

native for I-35 was approved by the City of Duluth. This alternative only required the taking of the Fitger rail access.[4] (Tr. Ct. T. 1023, 1206-07.) A final EIS for the project was approved by the FHWA in 1977. (Tr. Ct. T. 1030-31.) As of January 1, 1978, the State had not begun acquisition procedures or acquired a single piece of property for the I-35 project.

HISTORY OF THE LITIGATION

Fitger, on January 31, 1978, brought suit against the State of Minnesota, in Minnesota District Court, alleging that, by publicly announcing plans for I-35 which might have required the future condemnation of the Fitger property and by ordering Fitger to install pollution abatement equipment, the State had taken the Fitger property without just compensation in violation of the Minnesota Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution.

The case came on for trial by jury on October 29, 1986, and continued through November 19, 1986, when the jury returned answers to special interrogatories. The jury found that the Fitger business had been adversely affected by publicity of the I-35 planning process, that Fitger relied on the State's statement that it would appear to be impractical to install pollution abatement equipment, and that by these actions the State restricted Fitger's ability to develop its property.

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[4] On June 7, 1979, the State of Minnesota, in a separate action, instituted condemnation proceedings to acquire the Fitger rail access. This separate action is currently pending in Minnesota District Court. There was no evidence by either party at the trial of the inverse action concerning the taking of rail access. Claims relative to the rail access are being raised for the first time by Petitioner in its Petition for a Writ of Certiorari to this Court. (Petition at 4 n.2.)

The jury found damages to the Fitger property in the amount of $1,250,000. The trial court found that a taking of the Fitger property had occurred and ordered judgment in the amount of $1,087,833 plus interest calculated from September 30, 1972.

The State appealed from the judgment of the trial court to the Minnesota Court of Appeals.[5] The Minnesota Court of Appeals observed that, while a jury may be impaneled in an inverse condemnation action to determine issues of fact, the determination of whether the facts give rise to a constitutional taking is a legal determination to be made by the Court. (Petition, Appendix A.) The Minnesota Court of Appeals properly noted jurisdiction to review *de novo* questions of law and concluded that the activities undertaken by the State in planning I-35 did not give rise to a constitutional taking of the Fitger property. The Minnesota Supreme Court denied Fitger's Petition for Review of the Decision of the Court of Appeals on February 23, 1988. (Petition, Appendix B.)

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[5] The State raised four issues in its appeal to the Minnesota Court of Appeals. Because the Minnesota Court of Appeals determined, as a matter of law, that there had not been a constitutional taking of the Fitger property, the Court did not find it necessary to reach the three remaining issues raised by the State in its appeal.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

The Petition for Writ of Certiorari should be denied because Petitioner has failed to show there are "special and important reasons" for this Court to grant discretionary review as required by Supreme Court Rule 17.

I. THE MINNESOTA COURT OF APPEALS DID NOT ERR IN DETERMINING THAT THE PLANNING ACTIVITIES OF THE STATE OF MINNESOTA UNDERTAKEN IN PLANNING A MAJOR INTERSTATE HIGHWAY DID NOT GIVE RISE TO A TAKING UNDER THIS COURT'S STANDARDS FOR DETERMINING WHETHER A TAKING HAS OCCURRED WITHIN THE MEANING OF THE FIFTH OR FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION.

The Minnesota Supreme Court has directly addressed when the actions of a government agency give rise to a constitutional taking in *Alevizos v. Metropolitan Airports Commission*, 298 Minn. 471, 216 N.W.2d 651 (1974). In *Alevizos* the Minnesota Supreme Court held a government's actions give rise to a taking when those actions result in a "direct and substantial invasion" of property rights to such a magnitude that the owner is "deprived of the practical enjoyment of the property and that such invasion results in a definite and measurable diminution of the market value of the property." *Id.* at 487, 216 N.W.2d at 662. This standard is consistent with the taking standard of this Court and was applied by the Minnesota Court of Appeals in the present case. Petitioner Fitger does not directly contest the constitutionality of this standard. Rather, Fitger asks this Court to review the factual findings which compelled the Minnesota Court of Appeals to conclude that there was no constitutional taking of its prop-

erty and to grant review because the Minnesota Court of Appeals failed to properly apply this Court's standard for determining whether there has been a constitutional taking of its property.[6] The Minnesota Court of Appeals' decision is not, however, in conflict with any decision of this Court.

Fitger claims that the State has taken its property by proposing for public consideration highway construction plans which might have required a taking of its property.[7] This Court has repeatedly stated that not every government action affecting the value of property constitutes a taking. *Keystone Bituminous Coal Association v. DeBenedictis,* 107 S. Ct. 1232, 1244-45 (1987); *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 14 (1984); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978).

The established and controlling rule in this case is the rule set out by this Court in *Danforth v. United States,* 308 U.S. 271 (1939). In *Danforth,* this Court held that the adoption of specific plans for a public improvement by a governmental

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[6] This Court has repeatedly stated that issues of fact are for the conclusive determination of the State courts. *Wolfe v. State of North Carolina,* 364 U.S. 177, 196 (1960) and *Watts v. State of Indiana,* 338 U.S. 49, 50-51 (1949). The fact that the Minnesota Court of Appeals considered both the undisputed factual evidence presented at trial as well as the jury's conclusions concerning factual disputes is not a "special and important reason" for this Court to grant review.

[7] Fitger argues that the Minnesota Pollution Control Agency has contributed to this alleged taking by requiring Fitger to abate its pollution of Lake Superior. However, this Court has long recognized that there is no constitutional taking when a State acts to protect the public's interest in the environment by compelling private individuals to abate activities akin to a public nuisance. *Keystone Bituminous Coal Association v. DeBenedictis,* 107 S. Ct. 1232, 1243-44 (1987) and *Northwest Laundry v. City of DesMoines,* 239 U.S. 486, 491-92 (1916).

body does not constitute a taking even where the plans identified the property necessary for the project. This Court stated:

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

Id. at 285. The holding of *Danforth* was recently cited by this Court with approval in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In *Agins*, a regulatory taking case, this Court observed that the California Supreme Court acted properly in holding that good faith government planning activities in anticipation of adopting a zoning ordinance do not constitute a taking even when those activities adversely affect property values. *Id.* at 263 n.9.

The opinion of the Minnesota Court of Appeals clearly comports with this Court's holding in *Danforth*. The activities undertaken by the State were legitimate planning activities in response to local concerns and requirements of federal law. *Fitger Brewing Company v. State of Minnesota*, 416 N.W.2d 200, 204 (Minn. Ct. App. 1987). Fitger wanted and requested assurances from the State during the planning process that its property would be taken. The Court found that the State could not and did not give Fitger such assurances. *Id.* at 208. The Court concluded Fitger voluntarily chose to close its brewery rather than continue in operation and install pollution abatement equipment.[8] *Id.* Fitger puts forth no "special

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[8] Fitger claims that the State, by opposing its petition to the City of Duluth to vacate a valid street easement and by requesting it to oppose inclusion of its property in the National Register of Historic Places, affirmatively restricted development of its property. (Petition at 5.) The Minnesota Court of Appeals gave no particular weight to these claims, obviously concluding mere requests made by a government agency do not give rise to a restriction of property rights.

or important reasons" why this Court should re-examine its decision in *Danforth*.

Fitger ignores the dictates of this Court as set forth in *Danforth* and instead asserts that the Minnesota Court of Appeals erred in failing to focus on Fitger's purported injury pursuant to the line of cases issued by this Court governing regulation takings. Although the *Danforth* rule clearly controls in the present case, even if the regulatory taking analysis is applied to this case, the *Alevizos* rule as applied here by the Minnesota Court of Appeals is consistent with this Court's regulatory taking analysis. (Petition at 17.)

In regulatory taking cases this Court has consistently held that, absent a physical invasion of property, the constitution requires a balancing of the alleged injury to the landowner with the government's interest in the proper exercise of its police powers. *Id.; see also Nollan v. California Coastal Commission*, 107 S. Ct. 3141, 3146 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Contrary to the assertions made by Fitger, consideration of the government's goals, the importance of those goals, the legitimacy of those goals, and the method the government used to attain those goals are not only a part of the taking analysis but are essential components of that analysis. *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 1244-45 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 261-62 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-27 (1978). As Justice Holmes noted.

> Government hardly could go on if to some extent the values incident to property could not be diminished with-

> out paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); *see also Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984) (holding certain government intrusions of private property must be borne by private parties as an advantage of living in a progressive society).

Governmental planning activities are a legitimate exercise of the government's police powers. In *Berman v. Parker*, 348 U.S. 26 (1954), this Court recognized that the scope of government's police powers was broad enough to encompass the government's planning activities and concluded:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide the nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. at 33.

The government's planning interests must be weighed against the burdens placed on landowners including: the uniqueness of the burden placed on the individual landowner as opposed to the burden suffered by the public at large; the nature of the government interference; the degree or extent of the invasion; the property use remaining to the landowner;

the rights invaded, and the owner's ability to continue to use its property. *See Nollan v. California Coastal Commission,* 107 S. Ct. 3141, 3145, 3150 (1987) (discussing burdens on landowner which should be considered in determining whether a taking has occurred); *Keystone Bituminous Coal Association v. DeBenedictis,* 107 S. Ct. 1232, 1242-43, 1248 (1987) (discussing possible burdens placed on an owner by the government's activities); *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 14-15 (1984) (discussing burdens placed on landowner pending future condemnation); *Agins v. City of Tiburon,* 447 U.S. 255, 260-62 (1980) (discussing kinds of burdens placed on a landowner by the government's activities); *Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 134-37 (1978) (discussing restraints on development as a burden imposed on property by the City's activities); *Armstrong v. United States,* 364 U.S. 40, 49 (1960) (discussing burdens placed on landowner as a result of the government's activities). The Minnesota Court of Appeals properly applied this type of analysis to the facts of this case.

The Minnesota Court of Appeals applied the *Alevizos* standard which requires proof of a " 'direct and substantial invasion' " of property rights of such a magnitude as to deprive an owner of the practical enjoyment of his property resulting " 'in a definite and measurable diminution of the market value of the property.' " *Fitger Brewing Co. v. State of Minnesota,* 416 N.W.2d 200, 205 (Minn Ct. App. 1987) (quoting *Alevizos v. Metropolitan Airports Commission,* 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974)). The *Alevizos* standard recognizes the importance of injury to the petitioner. Fitger does not directly contest the constitutional validity of the *Alevizos* standard. Rather, Fitger claims that the Appellate Court's conclusions after applying the standard are merely incorrect.

However, the Minnesota Court of Appeals considered the effect of the purported government intrusions in reaching its decision and concluded that there had been no taking of Fitger's property. The finding of the Minnesota Court of Appeals is not inconsistent with the dictates of this Court or the U.S. Constitution and does not merit this Court's attention.

II. THIS IS NOT AN APPROPRIATE CASE TO RESOLVE AN ALLEGED CONFLICT BETWEEN THE JURISDICTIONS CONCERNING WHETHER GOVERNMENT PLANNING ACTIVITIES CAN EVER GIVE RISE TO A CONSTITUTIONAL TAKING.

Fitger argues that this Court should accept review to settle a conflict among the jurisdictions regarding whether a decline in a property's land value caused by the plotting and planning of a public improvement constitutes a taking. (Petition at 19.) The commonly accepted rule throughout the country is that mere plotting and planning of a public improvement project in anticipation of a taking does not result in a taking. *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied* 444 U.S. 899 (1979); *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 820 (Minn. 1984); *Lone Star Industries v. Secretary of Kansas Department of Transportation*, 234 Kan. 121, 127, 671 P.2d 511, 516-17 (1983); *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 151-52, 583 P.2d 165, 169, 148 Cal. Rptr. 640, 644-45 (1978). Several of those jurisdictions that have adopted the general rule have relied on this Court's reasoning in *Danforth* to reach the conclusion that planning does not give rise to a taking. *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied* 444 U.S. 899 (1979);

Howell Plaza, Inc. v. State Highway Commission, 92 Wis. 2d 74, 82-83, 284 N.W.2d 887, 891 (Wis. 1979); *City of Buffalo v. J. W. Clement Company*, 28 N.Y.2d 241, 255, 269 N.E.2d 895, 903, 321 N.Y.S.2d 345, 357 (1971). There are, however, a few jurisdictions which have held that plotting, planning, and other activities in anticipation of a taking may constitute a taking when the government's actions result in such a direct, substantial, and peculiar interference with a property interest that the owner's property value is diminished. *See Richmond Elks Hall Association v. Richmond Development Agency*, 561 F.2d 1327, 1330 (9th Cir. 1977); *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775, 777-78 (Mo. Ct. App. 1984); *Conroy-Prugh Glass Co. v. Commonwealth of Pennsylvania Department of Transportation*, 456 Pa. 384, 388 A.2d 598, 602 (1974).

Although there would appear to be a difference between those jurisdictions following the general rule and those few states going beyond that rule, this case is not an appropriate vehicle for resolution of that dispute. Fitger claims that this case would have different results depending on the state or federal circuit in which it was brought. There is no basis for this claim.

The Minnesota Court of Appeals noted the majority general rule recognized by the Minnesota Supreme Court in *Spaeth*. However, the Court of Appeals then went on to apply the taking analysis set out in *Alevizos*. The *Alevizos* analysis required the Court to determine whether the State's planning activities resulted in a direct and substantial invasion of property to such a magnitude that Fitger was deprived of the practical enjoyment of its property and to determine whether the invasion resulted in a definite diminution of the property's market value. *Fitger Brewing Co. v. State of Minnesota*,

416 N.W.2d 200, 205 (Minn Ct. App. 1987) (quoting *Alevizos v. Metropolitan Airports Commission of Minneapolis*, 298 Minn. 471, 487, 216 N.W.2d 651, 662 (1974)). The Court, after applying the *Alevizos* standard, found there had not been a taking. The *Alevizos* standard is substantially similar to the analysis followed in the more stringent jurisdictions. There is no reason to believe that those jurisdictions, using a substantially similar standard, would reach a different conclusion in this case.

Fitger cites nine taking cases from eight jurisdictions in support of its position that this case would have been treated differently in another jurisdiction. However, in each of those cases the governmental agency's actions went beyond the types of plotting and planning activities undertaken by the State of Minnesota in the present case.[9] Based on these cases,

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[9] *See Richmond Elks Hall Association v. Richmond Development Agency*, 561 F.2d 1327 (9th Cir. 1977) (taking found where government planned the project, adopted a four year acquisition plan including the subject property, commenced condemnation actions, entered into an agreement with a private developer to implement development of the area including the subject property, acquired 83 percent of all property needed for the development, and only then decided not to acquire the subject property); *Ventures in Property I v. City of Wichita*, 225 Kan 698, 594 P.2d 671 (1979) (taking found where city would restrict development of property inside a proposed highway corridor at State request in order to reduce the property value for future acquisition); *Jones v. People ex rel. Department of Transportation*, 22 Cal. 3d 144, 583 P.2d 165, 148 Cal. Rptr. 640 (1978) (taking found where, due to planned freeway construction, city closed certain roads accessing the subject property, refused to approve owner's subdivision plans, postponed acquisition of the subject property and where State had acquired some property and had made the owner of the subject property and offer); *Washington Market Enterprises Inc. v. City of Trenton*, 68 N.J. 107, 343 A.2d 408 (1975) (taking found where city terminated a redevelopment project after it had adopted a redevelopment plan including the subject property, designated subject property as blighted, authorized acquisition,

none of the eight jurisdictions would find that the types of planning activities undertaken by the State of Minnesota constitute a taking.

To the contrary, in two of the jurisdictions relied upon by petitioner, Kansas and California, the state supreme courts have held that planning activities of the kind undertaken by the State of Minnesota do not give rise to a taking. *See Lone Star Industries Inc. v. Secretary of Kansas Department of Transportation*, 234 Kan. 121, 671 P.2d 511 (1983) (holding no taking as a result of the State's announced intent to acquire property for highway construction even though the acquisition

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and acquired a vast majority of properties surrounding the subject); *Petition of Cornell Industrial Electric Inc.*, 19 Pa. Commw. 599, 338 A.2d 752 (1975) (taking found where government delayed a scheduled property acquisition after all government plans had been approved, government had begun condemnation, but government had delayed acquisition of petitioner's property to a later date); *Textron, Inc. v. Wood*, 167 Conn. 334, 355 A.2d 307 (1974) (taking found where State had informed owner that it might acquire the property, had appraised the property, had initiated negotiations with the owner, had told owner the property was needed by a date certain, and had advertised construction bids for the project); *Conroy-Prugh Glass Co. v. Commonwealth of Pennsylvania Department of Transportation*, 456 Pa. 384, 321 A.2d 598 (1974) (taking found where subject property abutted an in-place bridge and which would be used in every conceivable highway construction plan); *Roth v. State Highway Commission of Missouri*, 688 S.W.2d 775 (Mo. Ct. App. 1984) (taking found where the State asked the city to halt the owner's property development in 1969, State made the owner direct purchase offers from 1971 through 1974 which were rejected but the State did not institute condemnation procedures until 1976); and *In re Virginia Park v. City of Detroit*, 121 Mich. App. 153, 328 N.W.2d 602 (1982) (taking found where city commenced urban renewal project, sent notice to owner's tenants in 1973 that it would be condemning the property, tenants moved out, and city delayed condemnation procedures until 1979).

was discussed with the owner but the scope of the taking was unknown); *Selby Realty Company v. City of Buenaventura*, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal Rptr. 779 (1973) (holding mere adoption of an avenue area plan showing possible taking of subject property was not a taking). Both the California and Kansas Supreme Courts stated that if they were to label preliminary planning activities, such as those undertaken by the State of Minnesota, as a taking, government planning of public improvement projects would grind to a halt. *See id.* at 120-21, 514 P.2d at 117, 109 Cal Rptr. at 805-06; *Lone Star*, 671 P.2d at 517.

On September 30, 1972, when Fitger closed its brewery, the State of Minnesota had done nothing more than plan a public improvement project and attempt to abate pollution of Lake Superior. The State had not adopted or approved a plan or design for I-35. In fact, the State's consultant was actively considering twenty-five separate alignments of which only some would utilize the brewery property. The State had not initiated acquisition activities; had not made offers, acquired properties, or made appraisals; and had not adopted a right-of-way plan. The decision in this case would have been the same regardless of the jurisdiction in which it arose.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari filed by Petitioner Fitger Brewing Company should be denied.

Respectfully submitted,

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